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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1028

JESSE GREEN IN BEHALF OF HIMSELF AND BESSIE HENDERSON, ALDO THOMPSON, GEORGE BROWN, ET AL.,

Petitioners,

vs.

ANCHOR MILLS COMPANY, A CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

WHITEFORD S. BLAKENEY,
Counsel for Respondent.

GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

Reference to Official Report of Opinion to Court Below

The opinion of the Supreme Court of North Carolina which the petitioners are asking this Court to review is officially reported in 224 N. C. 714.

Statement of Grounds on Which Jurisdiction of This Court Is Invoked

It is the respondent's understanding that the petitioners contend that jurisdiction to review and determine this cause is conferred upon this Court by the provisions of 28

U. S. C. A., section 344. The respondent does not question the court's jurisdiction in the matter.

Statement of the Case

As stated in their petition for writ of certiorari, the petitioners are employees who maintain and service an office building, the principal occupants of which are engaged in interstate commerce. The petitioners assert that in such situation, they are entitled to the benefits of the Federal Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 201, *et seq.*, commonly known as the Wage and Hour Law.

The respondent's contention is that the petitioners in such situation are not covered by the provisions of the Act.

Argument

A person is entitled to the benefits of the Fair Labor Standards Act only in case he is an employee engaged:

(1) "In (interstate) commerce"; or

(2) "In the production of goods for (interstate) commerce"—production being broadly defined as hereinafter discussed.

29 U. S. C. A., Sections 206 and 207 and Sections 203(b) and 203(j).

The test under this Statute is not whether the employer is thus engaged, but whether the employee is so engaged—in the particular work which he does.

Kirschbaum v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638.

McLeod v. *Threlkeld*, 319 U. S. 497, 63 S. Ct. 1248, 87 L. Ed. 1455.

As hereinabove stated, the petitioners were employees engaged in servicing an office building in which interstate commerce was carried on. If goods were produced in such

building, the petitioners (under *Kirschbaum* v. *Walling*, *supra*, and *Walton* v. *Southern Package Corporation*, 88 L. Ed. 220), would be entitled to recover in this action. The petitioners do not claim, however, that any such production exists. The trial court found as a fact that the production of goods is in no way present as an element in this case (R. 35, par. 5).

The classification No. 2 above referred to is, therefore, not involved in this case. The only question to be decided is whether the petitioners in servicing this office building are thereby brought within category No. 1 above mentioned —that is, whether the petitioners in servicing this office building are thereby engaged "in" interstate commerce. Or to state it more completely, the question is whether the petitioners in servicing this office building are engaged "in" interstate commerce because occupants of the building are so engaged.

The trial court and the Supreme Court of North Carolina answered this question in the negative. Numerous other courts including various United States Circuit Courts of Appeal, United States District Courts and State Courts of last resort have answered the same question in the negative. On three separate occasions, this Court has refused to review such decisions denying recovery to persons in the same position as the petitioners.

So far as the respondent has been able to ascertain, and apparently insofar as the petitioners have been able to ascertain, there is no case in which this question has been ultimately answered favorably to the petitioners. The following are the principal cases in which the question here at issue has been decided contrary to the contentions now being made by the petitioners and in favor of the defense now asserted by the respondent. The ruling of these decisions is that although the occupants of an office building

are therein engaged in interstate commerce, persons who service and maintain that building are not thereby engaged in Interstate commerce. Or to phrase the matter differently, servicing an office building is not interstate commerce, nor a part of interstate commerce, simply because interstate commerce is transacted in the building.

Decisions of United States Circuit Courts of Appeal

Johnson v. *Dallas Downtown Development Company*, 132 F. (2d) 287 (C. C. A. 5th). Certiorari denied by this Court, 318 U. S. 790, 87 L. Ed. 1156.

Rosenberg v. *Lorenzetti*, 137 F. (2d) 742 (C. C. A. 9th). Certiorari denied by this Court, 64 S. Ct. 82, 88 L. Ed. —.

Lofther v. *First National Bank of Chicago*, 138 F. (2d) 299 (C. C. A. 7th). (The opinion in this case contains a good summary of some of the leading decisions on the question here at issue.)

Rucker v. *First National Bank of Miami, Oklahoma*, 138 F. (2d) 699 (C. C. A. 10th). (The opinion in this case contains an able discussion of the question at issue.)

Tate v. *Empire Building Corporation*, 135 F. (2d) 743 (C. C. A. 6th).

Cochran v. *Florida National Banking Corporation*, 134 F. (2d) 615 (C. C. A. 5th).

Johnson v. *Masonic Building Company*, 138 F. (2d) 817 (C. C. A. 5th).

Decisions of United States District Courts

Brandell v. *Illinois Bank*, 43 F. Sup. 781 (Ill.).

Johnston v. *Filstow, Inc.*, 43 F. Sup. 930 (Fla.).

Hinkler v. *Maiden Lane Corporation*, 50 F. Sup. 263 (N. Y.).

Wideman v. *Calhoun Realty Company*, 50 F. Sup. 627 (Ga.).

Building Employees Union v. *Trenton Trust Company*, 53 F. Sup. 129 (N. J.).

Decisions of State Courts of Last Resort

Stoikes v. *First National Bank of the City of New York*, 48 N. E. (2d) 482 (N. Y.). Certiorari denied by this Court, 64 S. Ct. 50, 88 L. Ed. —.

Cecil v. *Gradison*, 40 N. E. (2d) 958 (Ohio).

Johnson v. *National Life Insurance Company*, 166 S. W. (2d) 935 (Okla.).

Baum v. *A. C. Office Building*, 143 P. (2d) 317 (Cal.).

Robinson v. *Massachusetts Life Insurance Company*, 158 S. W. 441 (Tenn.).

Such unanimity of judicial opinion surely must be grounded in good sense and reason. It is indeed good reason and common sense that not all of human activity is to be classed as interstate commerce. And if there are still to be any lines of distinction between what is local and what is interstate, then surely in the matter here at hand, the line which has been drawn is a proper one.

In some degree, it is, of course, true that those who service an office building are thereby affecting and contributing to the interstate commerce carried on by the tenants of such building. But in such sense and in some degree, hardly any person can be found who is not affecting and contributing to interstate commerce. The point is that the effective ambit of the statutory phrase "engaged in interstate commerce" should not include, and has not yet been interpreted to include, whatever affects or contributes to that commerce.

This Court, speaking to this very question in applying the Statute now under consideration, says:

> "Our question is whether he was 'engaged in commerce.' We have held that this clause covered every employee *in* the 'channels of interstate commerce,' * * * as distinguished from those who merely *affected* that commerce. * * * The test under this present Act to determine whether an employee is engaged in commerce is *not whether* the employee's activities *affect or directly relate to* interstate commerce, but whether they *are actually in or so closely related to* the movement of the commerce *as to be a part of it.*" (Emphasis supplied.)
>
> *McLeod* v. *Threlkeld*, 319 U. S. 497, 63 S. Ct. 1248, 87 L. Ed. 1544.

Thus the trial court below reasonably and rightly held that:

> "Here the plaintiffs perform no service directly or closely related to the movement of goods in interstate commerce or directly or closely related to any of the interstate business transactions conducted by occupants of the building in and from their several offices. The plaintiffs render local services of accomodation and convenience to persons who are engaged in interstate commerce. The plaintiffs themselves are not so engaged." (R. —.)

The matter is thus summarized by the United States Circuit Court of Appeals for the Tenth Circuit:

> "Whatever may have been the doubts and differences along the way, it now seems fairly plain that the phrase '*engaged in commerce,' when used to measure coverage under the Fair Labor Standards Act, encompasses only employment actually in the 'movement of commerce,' or activities so closely related thereto as to be practically a part of it.* In other words, 'engaged in com-

merce' means engaged in the interstate transportation or movement of commerce." (Emphasis supplied.)

Rucker v. *First National Bank of Miami, Oklahoma*, 138 F. (2d) 699, 705 (C. C. A. 10th).

Apparently the petitioners' only argument is posed in this question: If in a building where production for interstate commerce is carried on, service employees are covered by the Act, then why are service employees not also covered in a building where interstate commerce without production is carried on? The answer is that the wording of the Statute makes the distinction.

The Fair Labor Standards Act provides (29 U. S. C. A., Sections 203(j) and 206, 207) that any occupation "necessary to" the production of goods is covered. There is no similar provision with respect to interstate commerce—absent the element of production of goods. With respect to interstate commerce where production of goods is not present, no provision is to be found that an employee "necessary to" such commerce is covered, but only the provision that an employee "engaged in" such commerce is covered. That the petitioners are not "engaged in" commerce has already been hereinabove discussed upon reasoning and authority.

It might be conceded that the petitioners are "necessary to" interstate commerce, but there is no provision which thereupon brings them within the Statute. The provision is that if "necessary to" production, they are within the Statute. But since no element of production is present, they must be "engaged in" commerce in order to come within the Statute. As has been shown, they are not "engaged in" commerce.

As pointed out by this Court in the recent case of *Armour & Company* v. *Wantock, et al.*, 89 L. Ed. 120:

> "* * * The test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

Two recent decisions of the United States Circuit Court of Appeals for the Second Circuit in which this Court has recently granted certiorari and in which office building service and maintenance employees were allowed to recover under the Statute here in question afford the petitioners no comfort. In the first of these, *Borella* v. *Borden Company*, 145 F. (2d) 63 (C. C. A. 2nd), the Court says:

> "* * * It is clear that they (the plaintiffs) are not 'engaged in commerce'."

In the second of these cases, *Callus* v. *10 East 40th Street Building*, 146 F. (2d) 438 (C. C. A. 2nd), the Court again says:

> "They (the plaintiffs) can not effectively contend that they are 'engaged in (interstate) commerce'."

Yet in the instant case, no element of production being present, the petitioners can seek to recover, and do seek to recover, on this ground and this ground alone—that they are "engaged in" commerce. In such position, practical reasoning and all the decided authorities are against them.

Respectfully submitted,

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